No. 20,641

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA AND
BAKER AIRCRAFT SALES, INC.,

Appellants and Cross-Appellees,

v.

BETTY K. FURUMIZO, ET AL.,

Appellees and Cross-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

REPLY BRIEF FOR THE UNITED STATES

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In our main brief we demonstrated that the Federal Aviation Agency (FAA) Tower Controllers were not negligent in the performance of their duties at the Honolulu Airport at the time of the accident involved in this litigation. We also showed in that brief that, even assuming such negligence, the supervening negligence of Baker Aircraft's flying instructor was the sole proximate cause of the accident. While nothing in the appellees-cross appellant's brief or Baker Aircraft's answering brief to our main brief

refutes the Government's position, we now turn to certain additional points raised in those briefs.

1. Throughout their brief (pp. 18-30), appellees and cross-appellants have attempted to characterize this appeal as one questioning primarily the district court's resolution of factual questions. Appellees thus dwell at great length on factual questions relating to the standard of care the Government (through its air traffic controllers) was allegedly supposed to exercise in relation to the decedent Furumizo.

Discussion of these factual matters relating to standard of care is quite beside the point for before such matters may become relevant a legal duty owing to the decedent must be found to exist. The existence of such a duty is clearly a question of law, and, as we demonstrated in our main brief (pp. 23-24), the district court erred in holding that the controller owed a duty to the decedent to delay issuance of a takeoff clearance in this case.

No such duty can be gleaned from the Air Traffic Manual (ATM - 2 - A) in use at the time of the accident. To the contrary the controllers, by following this "bible for tower operators" (United States v. Miller, 303 F. 2d 703, 710 n. 16), in clearing the Piper for takeoff with an appropriate warning regarding turbulence in its flight path, were acting in full accordance with Civil Air Regulations having the force of

law. 14 C.F.R. 26.26 (1961 Rev.).

Nevertheless, the district court concluded that the manual aside, the controllers should have foreseen that an experienced flight instructor might be unaware of the nature of a fundamental rule of the road, i.e., that a clearance to takeoff is permissive and not mandatory, and that such an experienced instructor would simply disregard the known danger of turbulence. Appellees attempt to support this conclusion by the simple expedient of stating that the evidence was in conflict as to whether pilots generally were aware of the permissive nature of takeoff clearances. (Brief, p. 26). But the fact that some pilots may have been unaware of this fundamental rule of the road at the time of the accident provides no basis for a conclusion that the controllers should have anticipated that flying instructor Shima would be so unaware.

The existence of a duty involves foreseeability by the alleged tortfeasor of the risk of harm arising from his conduct to the party injured. Restatement of Torts 2d § 281, Comment c. It is the knowledge or reasonable belief of the

alleged tortfeasor that is significant. Thus, the fact that some pilots may have been ignorant of the permissive nature of takeoff clearances provides no evidence that the air traffic controllers were aware of any such ignorance on Shima's part. As our main brief shows (pp. 24-26), the evidence of record on this question is to the contrary. Thus, the district court's conclusion that the controllers should have anticipated flying instructor Shima's reckless conduct is without support and its holding--as to the existence of a duty on the part of the controllers to the decedent Furumizo, to delay takeoff clearance--must therefore fall.

2. As we demonstrated in our main brief (pp. 20-21), assuming for purposes of argument that the air traffic controllers were negligent in clearing the Piper for takeoff when they did, the later negligence of flying instructor Shima in immediately taking off without heed to the controllers' warning of turbulence intervened to break the chain of causation established by the assumed negligence of the controllers. Clearly, at the time of the assumed negligence, the tower personnel could not forsee that Shima, a highly experienced pilot and flying instructor, would recklessly disregard their explicit warning concerning turbulence in his takeoff path.

However, both appellees and appellant Baker Aircraft argue that Shima's negligence was foreseeable since the evidence showed that after giving the takeoff clearance, the controllers saw Shima takeoff and did nothing to prevent this (Brief for appellees, pp. 41-42; Answering Brief of Baker Aircraft, p. 12). In effect, appellees and appellant Baker Aircraft are suggesting that the controllers had the "last clear chance" to prevent the accident. The short answer to this argument is that there is absolutely nothing in the record which even remotely suggests that in very few seconds between the time the pilot recklessly started to take-off and his point of no return the controllers could have acted to prevent the takeoff.

3. Appellees and cross-appellants on their cross-appeal complain that they were not awarded adequate damages as against both the United States and Baker because of certain alleged errors committed by the district court. (Brief pp. 39-63).

a. The first alleged error is the district court's failure to take into account future possible inflation, with a consquent depreciation in the purchasing power of the dollar, throughout the period of the decedent's life expectancy, i.e., through the year 2003. But this con-

sideration is speculative and conjectural and it was therefore entirely proper for the district court to ignore it.

b. Appellees and cross-appellants also claim that they should have been awarded prejudgment interest from the date of decedent's death. But, as to the United States, it is clear that the Federal Tort Claims Act expressly bars any award of prejudgment interest. 28 U.S.C. 2674; Van Wie v. United States, 77 F. Supp. 22, 50 (N.D. Iowa).

c. Appellees and cross-appellants further argue that the district court should not have deducted estimated future federal income taxes from decedent's anticipated future earnings. The deduction, however, fully accords with decisions of this Court and other courts in confining damages to actual loss. Southern Pac. Co. v. Guthrie, 186 F. 2d. 926 (C.A. 9), certiorari denied 341 U.S. 904, reaffirming on rehearing 180 F. 2d 295 (wherein this Court said "We think, however, that for the expected period of Guthrie's life, he would have found taxes fully as certain as his prospect of continued earnings.")[1]; O'Connor v. United States, 269 F. 2d 578 (C.A. 2); Moffa v. Perkins Trucking Co.,

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1/ 180 F. 2d. at 302.

200 F. Supp. 183 (D. Conn.); Floyd v. Fruit Industries, Inc., 144 Conn. 659, 136 A. 2d 918; British Transport Comm. v. Gourley [1956] A. C. Law Rep. 185. See United States v. Sommers, 351 F. 2d 354, 360 (C.A. 10). See also Wright, Foreword, Damages for Personal Injuries, 19 Ohio S.L.J. 155, 157.

In any event, insofar as the Government may be liable for damages here, there can be no doubt that future estimated income taxes must be deducted from lost estimated future earnings. For as the Second Circuit stated in O'Connor v. United States, 269 F. 2d 578, 584-585:

> The compensatory nature of the right to damages under the Tort Claims Act requires such consideration of Federal Income Taxes; the plaintiff-appellee can recover only for losses sustained.

See also dissenting opinion of Moore, J. in Cunningham v. Rederiet Vindeggen, A/S, 333 F. 2d 308, 317 (C.A. 2). Cf. United States v. Hayashi, 282 F. 2d 599, 603 (C.A. 9).[2/]

e. Two other claimed errors merit only very brief comment. First, appellees and cross-appellant's contention to the contrary notwithstanding, (Brief pp. 59-61), the district court did personally evaluate the loss to appellee Betty Furumizo of her husband. That the court tried to put itself "in the place of average citizens and jurymen" in making the award of general damages was not an abdication of

2/ Cross-appellants rely on Kawamoto v. Yasutake, 410 P. 2d 976 (Haw.) to support their position that prospective federal income taxes may not be considered. But that case only deals
(Footnote continued)

its judicial responsibilities. Rather it involved an effort by the court to arrive at a realistic valuation of the wife's loss, and thereby exercise its judicial discretion in a reasonable manner.

Second, appellees and cross-appellants lift the court's description of decedent's wife out of context to support their assertion that the award of general damages to Mrs. Furumizo ($50,000) would have been higher but for the court's consideration that she was young, healthy, well-educated and attractive with prospects for remarriage (R. 610). But in noting these qualities the trial court was only indicating that she had less need for physical attention and moral encouragement than did someone like Mrs. Hayashi, a bedridden paralytic, who was awarded $72,200 in general damages for the loss of her husband. See United States v. Hayashi, 282 F. 2d 599 (C.A. 9). And it is only reasonable to conclude (as did the district court here) that where the dependence on the decedent for love, understanding and physical help is less, the loss is less.

CONCLUSION

For the reasons stated herein and in our main brief, it is respectfully submitted that the judgment of the district court should be reversed and the cause remanded to the

2/ (Footnote continued) with the question of the propriety of the trial court's refusal to instruct the jury that its award of damages (in contradistinction to its computation of damages) was not subject to current federal or state income tax levies.

istrict court with directions to enter judgment for the

nited States.

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OVEMBER 1966.

CERTIFICATE OF COMPLIANCE

I hereby certify that, in connection with the preparation of this reply brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

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